SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-529

FARLEY TERMINAL CO., INC.,

Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Response in Opposition to Petition for Writ of Certiorari.

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FARLEY TERMINAL CO., INC.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Response in Opposition to Petition for Writ of Certiorari.

Opinions Below.

The judgment of the United States Court of Appeals, entered July 9, 1975, not reported, appears in Appendix A hereto. The opinion of the United States Court of Appeals, entered July 9, 1975, not yet reported, appears in Appendix B hereto. The Judgment of the United States District Court for the Central District of California, granting The Atchison, Topeka and Santa Fe Motion for Summary Judgment, entered February 19, 1974, not reported, appears in Appendix C hereto. The United States District Court Findings of Fact and Conclusions of Law, not reported, appear in Appendix

D hereto. Those relevant pages of the Interstate Commerce Commission Decision in *Ex Parte 230,* Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service), 322 I.C.C. 301 (1964), dealing with trailer-rental contracts, specifically pages 303, 319, and 370-372, appear in Appendix E hereto.

Questions Presented.

Was it the intent of the Interstate Commerce Commission (hereinafter referred to as the *ICC*) that approved rate tariffs for leasing *TOFC* equipment in interstate commerce, filed pursuant to its *Ex Parte 230,* 322 I.C.C. page 301, supersede and render null and void TOFC Leasing Rates contained in existing carrier-shipper agreements?

What is the legal effect of The Atchison, Topeka and Santa Fe Railway Company being a party to Transcontinental Freight Bureau Tariff Supplement 41 to Freight Tariff 2-F, Item 4900-E, Section I filed pursuant to *Ex Parte 230?*

Statement of Case.

This case involves the rates to be charged for the leasing of trailers for use in piggyback or trailer-on-flatcar (TOFC) service as of November 17, 1967, the date that Transcontinental Freight Bureau Tariff, Supplement 41 to Freight Tariff 2-F, Item 4900-E, Section I, was filed by Santa Fe and the other railroads. Prior to that date, Santa Fe billed and charged Farley Terminal Co., Inc. (Farley) the rates contained in a lease agreement previously entered into by the parties.

In 1962, the Interstate Commerce Commission instituted a general investigation into trailer-on-flatcar

(TOFC) or piggyback service. The investigation was to cover "every aspect of TOFC operations. . . ." 322 I.C.C. 303.

On October 9, 1962, a pre-hearing conference formulated a series of proposed rules.

> "The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers." 322 I.C.C. at 319.

Other important aspects of the proposed rules included a requirement that a rail carrier providing all rail TOFC service make a specific provision in its tariffs for all incidental and accessorial services offered by it in connection therewith.

The Examiners recommended that railroads performing all rail TOFC services be required to publish in their tariffs all the rates, charges and rules connected with such service, including charges for the leasing of equipment, detention of trailers, accessorial services, and pickup and delivery service, if any such services are offered. The ICC stated in *Ex Parte 230* at page 370 that "unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the ELKINS ACT." *Ex Parte 230* was challenged by Santa Fe and others on grounds not relevant to this case and was reversed in *AT&SF R. Co. v. United States,* 244 F.Supp. 955 (1965) and was affirmed in *American Trucking Association v. AT&SF R. Co.,* 387 U.S. 847 (1967).

The Interstate Commerce Commission served an order dated July 13, 1967, on Santa Fe and other railroads requiring compliance with Rule 500.7 of *Ex Parte 230,* p. 415. Under the order, tariffs were required to be filed by August 18, 1967.

On August 2, 1967, the railroads filed a petition with the ICC to postpone the effective date of the order for a period of ninety (90) days beyond August 18, 1967, or until November 16, 1967.

The extension was granted and the result of the combined efforts of the various railroads involved was a formulation of the Interstate Commerce Commission approved Transcontinental Freight Bureau Tariff and filing thereof. The tariff was issued on October 12, 1967, and became effective on November 17, 1967. Santa Fe was a party to said multi-party tariff. The rates contained in said tariffs were consistent for all railroads furnishing the same services.

It was not until August 3, 1973, that Farley filed its complaint for breach of contract in the United States District Court for the Central District of California. In said complaint, Farley alleged only that Santa Fe commenced charging it at a higher rate in the tariff than the rate contained in the pre-existing leasing agreement. The complaint did not allege that the tariff rates were unreasonable. Also, it was not until August 3, 1973, that Farley first contested the tariff rates. Farley failed to file a protest with the Interstate Commerce Commission contesting said rates.

In its answer to Farley's complaint, Santa Fe contended that as a matter of law the rates contained in the tariff vitiated or negated the rates contained in the pre-existing leasing agreement.

The United States District Court granted Santa Fe's motion for summary judgment, dismissed Farley's complaint, and denied its motion for summary judgment, and entered judgment for Santa Fe. The findings of fact and conclusions of law of United States District Court for the Central District of California, entered February 19, 1974, are found in Appendix D. Farley appealed to the United States Court of Appeals for the Ninth Circuit which affirmed the decision rendered by the United States District Court in *Farley Terminal Co., Inc. v. The Atchison, Topeka and Santa Fe Railway Company*, No. 74-1872, July 9, 1975.

The substance of the Court of Appeals decision was that the filing of the ICC approved tariff by Santa Fe along with other railroads voided those rates covering the same subject matter in pre-existing contracts between the parties.

REASONS FOR NOT GRANTING THE WRIT.

I

The Decision Below Does Not Conflict With the Decision Rendered by This Court in Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Ry. Co., 284 U.S. 370 (1932).

In the *Arizona Grocery* case, this Court held that where the ICC, upon complaint, holds a hearing on the reasonableness of a rate, and determines a reasonable rate, it cannot thereafter, at a subsequent hearing, declare the previously declared reasonable rate to be unreasonable and give the unreasonableness of the rate retroactive application.

Although it is true that the Court in the *Arizona Grocery* case distinguished between Commission made and carrier made rates, it concluded that the Interstate Commerce Commission and not the Courts, has the power to determine the reasonableness of such rates. It is only after a shipper protests carrier made rates within a statutory period of time that the ICC holds a hearing to determine the reasonableness of such rates. If the ICC determines the rates to be reasonable, it may prescribe or order specific rates the carriers may charge.

In this case, Farley never filed a protest with the ICC as to the reasonableness of the rates charged it under the tariff.

It never contested the reasonableness of the tariff rates in its complaint on file with the United States District Court.

And further, it never brought the reasonableness of the tariff rates into issue at the United States District Court hearings below. Below it claimed only that the

tariff rates were in excess of the lease agreement rates. It is now raising the issue for the first time.

Still further, the issue of whether a tariff was a unilateral tariff was never discussed in the *Arizona Grocery* case.

II

The Holding Below Does Not Conflict With the Decision of Another Court of Appeals.

Farley cites the United States Court of Appeals, Eighth Circuit, case of *Middlewest Motor Freight Bureau v. United States,* 433 F.2d 212 (Eighth Circuit 1970), cert. denied 402 U.S. 999 (1971), for the erroneous proposition that Santa Fe is not entitled to keep the difference between the pre-existing contract rates with Farley and the tariff rates.

First, the *Middlewest Motor Freight Bureau* case on the facts is distinguishable, and the case further does not make such a statement.

In the *Middlewest Motor* case carriers filed a tariff containing a higher rate than a previously published rate. Various shippers contested that higher rate by filing a protest before the Interstate Commerce Commission, the body that Congress gave jurisdiction to determine rates. Although that case did have language indicating that the burden is on the carrier to show that its rates are just and reasonable, and to justify any change in rates, the shippers first had to avail themselves of their administrative remedy, *i.e.:* of filing a protest before the Interstate Commerce Commission. In the *Middlewest* case, therefore, the various shippers did file protests with the Interstate Commerce Commission over the new tariff rates. In the case here, Farley filed no such protest, and never challenged the

rates before the Interstate Commerce Commission, the body ordained by Congress to have exclusive powers for determining rates involving interstate commerce transactions.

Also, it should be noted that in the *Middlewest* case, *supra,* the I.C.C. after a hearing, found the tariff rates were not just and reasonable and ordered them cancelled.

In this matter, Farley never contested the reasonableness of the rates, and there never was a hearing held before the Interstate Commerce Commission in regard to same.

Further, the Court in the *Middlewest* case, *supra,* at page 222, in discussing whether tariff rates are unreasonably high or discriminating, states "such a judgment lies solely within the province of the Interstate Commerce Commission." The Court, in substance, held in the aforecited case that the tariff in question was unlawful because carriers maintained the tariff in violation of an order of the Interstate Commerce Commission.

III

Santa Fe Did Not Unilaterally Circumvent a Systemwide Contract Rate.

Santa Fe, along with numerous other rail carriers, became a party to Transcontinental Freight Bureau Tariff, Supplement 41 to Freight Tariff 2-F, Item 4900, Section I, covering rates involving leasing of TOFC equipment in interstate commerce. A mutually acceptable rate was determined by all carriers involved. The rate was approved by the ICC and the tariff became effective upon its filing on November 17, 1967. Farley, as well as other shippers and shippers' agents, had actual notice of the new rate found in the tariff, but

did not choose to protest it or challenge it before the ICC, the body having jurisdiction of said rate. The new rate was not a unilateral rate, but rather a multi-party rate. Case law cited by Santa Fe and relied upon partially by the United States Court of Appeals clearly shows that upon the effective date of the tariff, the rates of the pre-existing lease agreement were vitiated and void.

IV

Santa Fe Had No Duty to Publish Its Own Tariff Containing Rates Consistent With Existing Contracts.

It is unchallenged that Santa Fe was not the only party to the Transcontinental Freight Bureau rate, but many other railway companies were likewise parties. If Santa Fe had filed a tariff rate at the existing rate of the lease agreement, it would have been left with a rate different than those of other railroads with the same service. This would clearly constitute a violation of *The Elkins Act,* 49 U.S.C., Section 41, and likewise would have circumvented the public policy intended by Congress to preclude discrimination of rates in interstate commerce.

The Interstate Commerce Commission intended that tariffs required by it to be filed, pursuant to its *Ex Parte 230,* page 301, would apply to existing contracts. It was not necessary for the ICC to effectuate this intent by including express language in the order that existing contracts are abrogated upon effectiveness of the tariff. A vast and convincing body of Federal law relevant to regulation of interstate commerce, clearly states such a specific intent.

Pursuant to the requirement levied by *Ex Parte 230,* page 301, the railroads drafted a rate tariff covering

the leasing of TOFC equipment. That tariff, after approval by the ICC, was filed and had the force and effect of statute. To continue charging Farley the lease rates would have resulted in rate discrimination and violation of *The Elkins Act,* 49 U.S.C., Section 41.

The specific tariff filed was in no way a unilateral tariff formulated by Santa Fe. The filing of the tariff could in no way be construed to be a breach of contract by Santa Fe. Farley was presumed to know that the rates of the lease agreement would be negated upon its replacement by an ICC approved tariff. When Farley entered into the lease contract with Santa Fe, it had knowledge that the contract could be changed at any time by newly created rates, orders or statements of the ICC in fulfilling its obligation to regulate interstate commerce.

The following cases support the position of Santa Fe:

Louisville & Nashville Railroad Company v. Mottley, 219 U.S. 467, 477-486 (1911);

Armour Packing Co. v. United States, 209 U.S. 56, 81-83 (1908);

New Haven Railroad Company v. I.C.C., 200 U.S. 361;

Texas and Pacific Railroad Company v. Mugg, 202 U.S. 242, 245 (1906);

New Haven Railroad Company, supra, 200 U.S. at 393;

Lowden v. Simonds-Shields-Lawnsdale Grain Co., 306 U.S. 516, 520 (1939).

Farley has failed to show inconsistent United States Court of Appeals decisions on point. He has failed

to show any significant questions of Federal law that this court should decide. The possibility of antitrust law violations was never in issue in the courts below.

Conclusion.

For the above reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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APPENDIX A.

Judgment of the U.S. Court of Appeals for the Ninth Circuit, in Farley Terminal Company, Inc. v. Atchison, Topeka & Santa Fe Railway Co., No. 74-1872, entered July 9, 1975.

United States Court of Appeals, for the Ninth Circuit.

Farley Terminal Company, Inc., *Plaintiff-Appellant,* vs. Atchison, Topeka & Santa Fe Railway Company, *Defendant-Appellee.* No. 74-1872, DC #73-1818.

Harold Willinger as Assembly Con., *Plaintiff-Appellant,* vs. Atchison, Topeka & Santa Fe Railway Company, *Defendant-Appellee.* No. 74-2410, DC #73-1806.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

74-1872

With costs in this court in favor of the Appellee and against the Appellant in the amount of $326.84

Cost of printing Appellee's brief $326.84

Filed and entered July 9, 1975.

APPENDIX B.

Opinion of the U.S. Court of Appeals for the Ninth Circuit, in Farley Terminal Company, Inc. v. The Atchison, Topeka and Santa Fe Railway Company, No. 74-1872, entered July 9, 1975.

United States Court of Appeals, for the Ninth Circuit.

Farley Terminal Company, Inc., *Plaintiff-Appellant,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant-Appellee.* No. 74-1872.

Harold Willinger, doing business as Assembly Consolidators, *Plaintiff-Appellant,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant-Appellee.* No. 74-2410.

OPINION

[July 9, 1975]

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH and GOODWIN, Circuit Judges, and WOLLENBERG,* District Judge.

PER CURIAM:

In these separate but related actions for damages for breach of contract, Farley Terminal Co., Inc., and Harold Willinger, lessees of TOFC (trailer-on-flatcar) or "piggy-back" service equipment under separate but substantially identical lease agreements with the Atchi-

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*The Honorable Albert C. Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

son, Topeka and Santa Fe Railway Company (the Santa Fe), appeal from the district court's granting of summary judgments in favor of the lessor railway. The question presented is whether the Santa Fe's filing of a rate tariff as required by the Interstate Commerce Commission (ICC)—which tariff, when approved, imposed on lessees higher rates for the leasing of TOFC equipment than were provided in the pre-existing lease agreements—constitutes an actionable breach of those agreements. We conclude it does not and therefore affirm.

Briefly, the facts are these: In its decision in *Ex parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301 (1964), the ICC promulgated regulations requiring that each railroad providing TOFC service in interstate commerce publish, post, and file tariffs containing all rates and charges for the leasing of its TOFC equipment. *See* 322 I.C.C. at 415; 49 C.F.R. § 500.7 (1964), redesignated 49 C.F.R. § 1090.7 (1967).[1] Early in 1967, Farley and Willinger executed separate lease agreements with the Santa Fe whereby each agreed to lease trailers and flatcars from the railway on an availability basis, at rates specified in the agreements. During the following months, each was charged at those rates. However, in July, 1967, the ICC served an order on the Santa Fe and other railroads which provided TOFC service, requiring them to comply with the regulations promulgated in *Ex parte 230* by

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[1]A challenge to *Ex parte 230*, on grounds not relevant to this appeal, was sustained in *A., T. & S. F. R. Co. v. United States*, 244 F. Supp. 955 (N.D. Ill. 1965) (three-judge court), and then *reversed sub nom. American Trucking Associations, Inc. v. A., T. & S. F. R. Co.*, 387 U.S. 397 (1967).

filing appropriate tariffs before August 18, 1967. After obtaining a ninety-day extension, the railroads, including the Santa Fe, filed Trans-Continental Freight Bureau Freight Tariff 2-F, Supplement 41, Section 1, Item 4900-E. This tariff, which established higher rates for the leasing of TOFC equipment than were provided in the pre-existing leases, became effective November 17, 1967, after the ICC approved it. Lessees were thereafter charged at the new, higher rates. They brought these actions to recover the difference between the charges they paid under the tariff and those they would have paid under their respective agreements. The district court granted summary judgments in favor of the Santa Fe, and these appeals followed.

We commence with the fundamental principle that summary judgment is proper only where there is no genuine issue as to any material fact or where, viewing the evidence and the inferences which may be drawn therefrom in the light most favorable to the adverse party, the movant is entitled to prevail as a matter of law. Rule 56, F. R. Civ. P. Here the district court properly granted summary judgments in favor of the railroad.

Appellants concede, as they must, that once the new tariff rates for TOFC service became effective, the Santa Fe was bound by law to charge those rates. Section 6(7) of the Interstate Commerce Act, 49 U.S.C. § 6(7), prohibits carriers in interstate commerce from receiving "different compensation . . . than the rates, fares, and charges which are specified in the tariff filed and in effect at the time." Moreover, the Elkins Act, 490 U.S.C. §§ 41 *et seq.* provides criminal penalties for departures from the published rates, *see* 49 U.S.C. § 41(2), and for a carrier's

returning to a shipper rebates or offsets against them, *see* 49 U.S.C. §41(3).

Appellants nevertheless urge their entitlement to damages based on the variance between the tariff rates they were charged and those specified in their pre-existing agreements with the railway. We are not persuaded. It is well recognized that the principal congressional purpose in enacting the Interstate Commerce Act was to obtain a uniformity of rates and an end to discriminatory practices. As the Court early noted in *New Haven Railroad Company v. I.C.C.*, 200 U.S. 361, 391 (1906):

> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

Where, as here, a conflict exists between published tariff rates and rates enumerated in pre-existing agreements, we think it well established that the tariff rates must prevail. Were we to permit enforcement of the inconsistent contractual rates, we would significantly undercut the clear policy of the Act to secure equal rates for all, as well as condone one discriminatory situation such as the Act was intended to remedy. *See, e.g., Louisville and Nashville Railroad Company v. Mot-*

tley, 219 U.S. 467, 477-486 (1911); *Armour Packing Company v. United States,* 209 U.S. 56, 81-83 (1908); *Texas and Pacific Railway Company v. Mugg,* 202 U.S. 242, 245 (1906); *New Haven Railroad Company, supra,* 200 U.S. at 390-392.[2] *Cf. American Trucking*

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[2]For example, the Court observed in *Armour Packing Company, supra,* 209 U.S. at 81-82, as follows:

> "It [the law regulating interstate commerce] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.
>
> ". . . This feature of the law, it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate, upon the faith of which contracts have been entered into. But the right to make such regulations is inherent in the power of Congress to legislate respecting commerce, and such consideration of inconvenience or hardship address themselves to the law-making branch of the Government. . . .
>
> "The statute being within the constitutional power of Congress, and being in force when the contract was made, is read into the contract and becomes a part of it.
>
> "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

The Court further said in *Mottley, supra,* 219 U.S. at 482-483:

> "The agreement between the railroad company and the [plaintiffs] must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable. The framers of the Constitution never intended any such state of things to exist.
>
> ". . . After the commerce act came into effect no contract that was inconsistent with the regulations established by the act of Congress could be enforced in any court. The rule upon this subject is thoroughly established."

Association, Inc. v. A., T. & S. F. R. Co., 387 U.S. 397, 406 (1967).

In this connection, a tariff, rate, or charge, duly established in accordance with the Act, is the legal rate; it has the force of statute and is binding on carrier and shipper alike. *See Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939); *Pennsylvania Railroad Company v. International Coal Mining Company*, 230 U.S. 184, 196-197 (1913); *Robinson v. Baltimore and Ohio Railroad Company*, 222 U.S. 506, 508-510 (1912).[3] And a contract valid when made is nevertheless rendered void by subsequently established tariff rates which are inconsistent, at least to the extent of the inconsistency. *See Mottley, supra*, 219 U.S. at 480-486.[4] Moreover, a shipper's

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[3]Appellants rely heavily on *Macco Construction Company v. Farr*, 137 F.2d 52 (9th Cir. 1943), and *Ets-Hokin & Galvan, Inc. v. Maas Transport, Inc.*, 380 F.2d 258 (8th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967). We think both decisions are inapposite. In *Macco*, we held that a contract which incidentally violated a California licensing statute was not thereby rendered unenforceable because the California legislature did not intend that such violations void otherwise legal contracts. 137 F.2d at 55. And in *Ets-Hokin*, which relied in part on *Macco*, the Eighth Circuit held that a contract which violated the Motor Carrier provisions of the Interstate Commerce Act was not unenforceable because Congress, in passing those provisions, did not intend "that contracts resulting in violations of that portion of the Act be illegal and void." 380 F.2d at 260-261. Here, however, as noted in the cited cases, Congress did intend to render void rates inconsistent with those established in conformity with the Act.

[4]Appellants cite *Chicago, Milwaukee, St. Paul & Pacific Railroad Company v. Alouette Peat Products*, 253 F.2d 449 (9th Cir. 1957), for the proposition that, even though shippers are required to pay carriers the rate on file with the ICC, a showing that such a rate was not lawfully established would entitle them to recover the difference between what they had thus paid and the lawfully established rate. Here, however, appellants have presented no showing that the published rate was unreasonable or otherwise established in violation

(This footnote is continued on next page)

knowledge of duly published tariff provisions is presumed. *American Railway Express Company v. Daniel,* 269 U.S. 40, 42 (1925); *Kansas City Southern Railway Company v. Carl,* 227 U.S. 639, 653 (1913); *Chicago & Alton Railroad Company v. Kirby,* 225 U.S. 155, 166 (1912); *Mugg, supra,* 202 U.S. at 245.[5]

Appellants' remaining contention—that the Santa Fe was required under the circumstances to establish a tariff rate identical to that enumerated in its pre-existing agreement with appellants—is without merit. It is well settled that a carrier is entitled to initiate rates, and to adopt such policy of rate-making as it deems wise, subject to the revisory powers conferred upon the ICC. *See Diamond Tank Transport v. United States,* 23 F. Supp. 497, 501 (W.D. Wash., N.D. 1938) (three-judge court), *affirmed,* 305 U.S. 567 (1938); *United States v. Illinois Central Railroad Company,* 263 U.S. 515, 522 (1924). And in light of the congressional intention, already noted, that pre-existing agreements be abrogated by subsequently promulgated regulations, at least to the extent of the inconsistency, we think it clear that a carrier's decision fixing a proposed tariff rate to be charged uniformly to all should not be foreclosed by its pre-existing obligation to charge a different rate to a few.

AFFIRMED.

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of the Act. The mere fact that the published rate is inconsistent with a rate enumerated in pre-existing contracts does not render it violative of the Act.

[5]*Southern Pacific Company v. Miller Abattoir Company,* 454 F.2d 357 (3d Cir. 1972), relied on by appellants, is not to the contrary. That decision merely held that a provision in a shipping contract, requiring that the railroad immediately notify the consignee if a cargo of livestock were stopped in transit by quarantine, was not satisfied by the railroad's publication of a tariff explicitly stating that screw worms existed in Arizona and that livestock leaving that state would be stopped for inspection. *See* 454 F.2d at 361-362.

APPENDIX C.

Judgment of the United States District Court for the Central District of California, entered February 19, 1974.

In the United States District Court, for the Central District of California.

Farley Terminal Co., Inc., *Plaintiff,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant.* Civil Action No. 73-1818-EC.

JUDGMENT

This action came on for hearing before the Court, Avery E. Crary, District Judge, presiding, and the issues having been duly heard and a decision having been duly ordered,

IT IS ORDERED AND ADJUDGED, that the plaintiff take nothing and that the action be dismissed on the merits.

DATED at Los Angeles, California, this 19th day of February, 1974.

/s/ E. Avery Crary
United States District Judge

APPENDIX D.

Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California, entered February 19, 1974.

In the United States District Court, for the Central District of California.

Farley Terminal Co., Inc., *Plaintiff,* vs. The Atchison, Topeka and Santa Fe Railway Company, *Defendant.* Civil Action No. 73-1818-EC.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having duly heard defendant's Motion for Summary Judgment on February 11, 1974, does hereby make the following findings of facts and conclusions of law:

That on February 20, 1967, plaintiff and defendant executed a Lease Agreement, wherein defendant would lease to plaintiff, on an availability basis, TOFC equipment (flat cars and trailers) at rates specified in the terms of the aforementioned Lease Agreement;

That prior to November 17, 1967, defendant charged plaintiff for lease and use of such equipment pursuant to the aforementioned Lease Agreement;

That subsequent to November 17, 1967, Trans-Continental Freight Bureau Tariff Supplement 41 to Freight Tariff 2F, Item 4900, Section I, was approved by the Interstate Commerce Commission and filed and became effective;

That the aforementioned tariff had the force and effect of law and was the proper tariff for defendant to charge plaintiff for plaintiff's use of defendant's TOFC equipment in Interstate Commerce;

That the rates provided in said tariff, as a matter of law, rendered null and void the rates contained in the Lease Agreement, dated February 20, 1967; [although Ex Parte 230 did not express an intent to negative existing rate contracts]

That, therefore, as a matter of law, the proper rates for defendant to charge plaintiff for its use of defendant's TOFC equipment for eastbound movements in Interstate Commerce, were the rates contained in the aforedescribed tariff.

It is ordered, therefore, that defendant's Motion for Summary Judgment be and the same hereby is granted and that said Judgment be entered herein in the defendant's favor, dismissing this action with costs to be taxed by the Clerk in favor of the defendant and against the plaintiff.

DATED: Feb. 19, 1974

/s/ E. Avery Crary
United States District Judge

APPENDIX E.

SUBSTITUTED SERVICE—PIGGYBACK

John E. Faulk, R. M. Hartsock, and *Clement T. Mayo* for Department of Defense.

William R. Pierce for General Services Administration.

John H. Fallon, Harvey Gobetz, and *Asa J. Merrill* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Report of the Commission on Oral Argument

By the Commission:

This proceeding, instituted on June 29, 1962, on our own motion under the authority of parts I, II, III, and IV of the Interstate Commerce Act and section 4 of the Administrative Procedure Act, constitutes this Commission's first general investigation of what is probably the most significant recent development in transportation—trailer-on-flatcar or piggyback service. The notice of proposed rulemaking made it known that we intended this investigation to be broad in scope, encompassing every aspect of TOFC operations, and that we intended to explore new approaches to piggyback service. Among the matters specifically mentioned in the notice as a subject for consideration was:

> The extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV [open-tariff] rail rates and service in their operations.

It was also made clear that we intended to reexamine existing precedents and practices, and that consideration

would be given to the adoption of rules and regulations which might be found necessary to regulate coordinated and substituted service transportation in the public interest.

The order instituting this proceeding named as respondents all railroads, motor carriers, and water carriers of property, freight forwarders, and express companies operating in interstate commerce, and authorized and directed our Bureau of Inquiry and Compliance to participate. It also assigned the matter for a prehearing conference, which was held October 9, 1962, and at which proposed rules, reproduced as appendix II hereto, were distributed. Oral hearings have not been held, but representations, verified statements, and reply statements have been received from numerous interested parties. The proceeding was assigned to two hearing examiners who recommended adoption of the regulations contained in appendix III hereto. Exceptions to the .....

A similar, perplexing problem for shippers and carriers has been interpretation of the "mixture" tariff rule applicable to plan III transportation of "all-commodity" traffic. Ordinarily this type of rule will provide that not more than 60 percent of the weight of a total, two-trailer shipment may consist of any one commodity or article. One frequent variation of this tariff rule provides the alternative test; not more than 60 percent of the total shipment or not more than 60 percent of 70,000 pounds. The carriers do not seem to be applying any consistent approach in determining whether commodities being shipped are the "same" commodity or article. In general, neither commodity classifications nor other published listings are used to determine whether the articles included in a single

shipment are sufficiently dissimilar to constitute different commodities for the purposes of mixture rules. This state of affairs leaves a railroad free to haul straight truckloads of high-rated commodities at hidden bargain rates should it choose to do so for a favored shipper.

Bearing in mind the historical development of piggyback transportation and its present-day problems—as well as its appealing advantages—we shall now proceed to an examination of the issues raised directly by the instant investigation.

The Proposed Rules

At the prehearing conference held in this proceeding on October 9, 1962, a series of proposed rules, reproduced as appendix II hereto, was distributed. As noted at that time, they were designed to serve as a framework upon which rules ultimately to be adopted, if any, could be developed. The proposed rules represented something of a new approach to TOFC terminology as they attempted to separate TOFC service, without regard to the five numbered plans now in common use, into two more basic classes: "joint intermodal" TOFC service which would include any piggyback service performed jointly by a rail carrier and a motor or water common carrier; and "all-rail" TOFC service which would include any piggyback service in which traffic moves exclusively at rail rates and on rail billing.

The proposed rules were predicated upon the basic premise that all persons desiring to use TOFC service should be able to do so, with the charges for the same services being equal to all users, whether they be motor or water carriers, freight forwarders, or private shippers. The proposed rules B-4, B-5, C-1, and C-2 in .....

It is apparent that this state of affairs places a premium on a shipper's having a sophisticated traffic department, capable of assessing the various available services, charges, and allowances, and of determining what combination offers the best transportation bargain in moving a particular shipment. We think that carriers should be encouraged to use as simple a method of tariff publication as possible, and should be discouraged from permitting the kind of situation illustrated. It is also clear that the general practice by which railroads and their affiliates trip lease trailers to shippers for immediate use in TOFC service contains potential seeds of discrimination. Unless the same opportunity to lease equipment is made available to all similarly situated shippers at the same price, the leasing of a trailer to a favored shipper can become a concession violative of the Elkins Act.

While we recognize that there are opportunities for discrimination in present rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. The contentions that rail carriers are required by statute to publish rates only for a "complete" service and that they are obligated to furnish trailers wherever TOFC service is provided were disposed of in *Eastern Central M. Carriers Assn. v. Baltimore & O. R. Co.*, 314 I.C.C. 5, 45-47, *aff'd. sub nom. Cooper-Jarrett, Inc., v. United States*, ... F. Supp. .... (W.D. Mo. 1964) (civil action No. 13469, February 6, 1964). The basic flaw in the A.T.A's legal argument, which was also pointed out in that decision, appears to be the false assumption that a highway trailer necessarily is an "instrumentality of transportation" which carriers must

furnish. This can, of course, be the case when a railroad holds out a service which by its nature requires performance of some motor carriage. But it need not hold out to perform more than rail service, and in that case the trailer, tendered for transportation by a shipper, is nothing more than a container—an "article of commerce."

We must point out here that we are not holding that the service which a carrier holds out to perform can only be ascertained from the actual words of its tariff. When a rail carrier offers a ramp-to-ramp TOFC service, ostensibly confined to the line-haul rail transportation of loaded highway trailers tendered at its terminal by shippers, but then proceeds to lease trailers, and to provide drayage, loading, and other "accessorial" services, we think that it is *in fact* holding out a complete door-to-door service. In such a case, all the services it provides become *transportation* services rather than mere accessorial services, and they are required to be the subject of its tariff publications. This, we think, disposes of the New York Central's argument that we have no authority to require the publication of accessorial services. To agree with the Central's position would be to allow any carrier, by self-imposed limitations contained in its tariffs, to designate what it considers to be transportation services and what it considers nontransportation services. This distinction is, we believe, a matter of fact and not one that can be imposed by fiat. The nature of piggyback—the fact that its advantage lies in its being a combination of rail and motor transportation—makes rail carriers tend to offer to their customers services which were traditionally provided only by motor carriers and which can physically be performed only with motor vehicles.

Such services, we believe, will normally be transportation services when offered in connection with TOFC transportation.

The existence of opportunities to engage in discriminatory practices, standing alone, will not, in our opinion, justify our requiring a strict format for TOFC rate publications or striking down the prevalent practice of trailer leasing by railroads. The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. In spite of the variety and complexity of all-rail TOFC tariffs, they seem to be serving their purpose effectively, and we would not be justified in imposing a new scheme of publication in the absence of specific shipper complaints. The same appears to be true of trailer leasing. Where complaints of discrimination have been made, as in the case of certain midwestern meat-packers, the railroads involved have taken steps to correct the situation. We agree with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice. The only significant change we think necessary in the recommended tariff rules is to provide for publication by rail carriers of the leasing charges of affiliates. To omit the practices of rail-affiliated leasing companies from the effect of the leasing rule would obviously be to create a legal loophole and to allow the doing by indirection of what could not be done directly. The following rules will be adopted:

7 *Tariff publication regulations.*

(*a*) Each railroad performing or holding out to perform TOFC service shall publish, post, and file tariffs (itself or through an agent) which shall contain in clear and explicit terms all of the rates and charges for and the rules governing the leasing of equipment to any person using its TOFC service (whether by the railroad itself or by any person affiliated with or controlled by the railroad or any agents of the railroad), and other special services or practices, including charges for pickup or delivery service when such charges are in addition to line-haul transportation charges. Such tariffs shall also contain, in clear and explicit terms, all amounts to be paid to any shipper for the lease of any empty truck, trailer, or semitrailer (or the container portion of any truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidentally to its prior or subsequent use in TOFC service.

(*b*) No allowance shall be payable by a rail carrier to any shipper, freight forwarder, or consignee which renders any service or furnishes any instrumentality in connection with TOFC service unless (1) such service is one that the rail carrier is obligated to perform or provide under the applicable rate and (2) the amount of the allowance is published in tariffs on file with the Interstate Commerce Commission.

(*c*) The area within which pickup and delivery service will be performed by a rail carrier offering to provide TOFC service shall be described specifically and the description published in clear and explicit terms in the tariff. It is not permissible to refer to decisions of the Commission for the description nor to state

that the area within which pickup and delivery service will be performed is that defined by the Commission in a formal proceeding.

(*d*) All rail tariffs containing rates for TOFC transportation of property shall specify the extent to which such rates do or do not include the loading and unloading of property from or to the highway vehicle by the carrier. When charges in addition to the line-haul TOFC transportation charges or in addition to pickup or delivery charges, if any, are made for the loading or unloading of property, they shall be published in appropriate tariffs and filed with the Interstate Commerce Commission.

(*e*) Highway vehicles or rail cars provided by shippers or freight forwarders in connection with all-rail TOFC service, while on railroad premises, shall be subject to the storage or demurrage rules, regulations, and charges published in tariffs on file with the Interstate Commerce Commission.

Billing and Notification Rules

Section D of the proposed rules and the examiners' recommended rules 19 through 23 deal with the billing of TOFC shipments and .....